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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1022

HERMAN MYRON FELDMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Herman Myron Feldman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on March 26, 1964, which judgment affirmed a judgment of sentence of the United States District Court for the Eastern District of Pennsylvania of April 5, 1963, entered April 22, 1963.

Citations to Opinions Below

This case was tried before the United States District Court for the Eastern District of Pennsylvania, Honorable ALFRED A. LUONGO, Judge of said Court, and a jury, commencing on May 31, 1962 and terminating on June 7, 1962. Petitioner was found guilty by the jury on the charge of conspiracy. Petitioner filed a post trial motion for a judgment of acquittal, or, in the alternative, for a new trial. The opinion of the District Court denying the motion, printed in Appendix B hereto, *infra*, pages 16-30 is reported in 215 F. Supp. 390. The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on March 26, 1964. A copy thereof is printed in Appendix B hereto, *infra*. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. (a) Whether the petitioner was enfitled to have the trial court inspect the transcript of grand jury testimony of the crucial government witness, for inconsistencies upon timely request?

   (a) Whether the petitioner was burdened to establish a "particularized need" for inspection by the trial court of the grand jury testimony of the crucial government witness, prior to requesting the trial court to make the said inspection?

2. Whether the petitioner was denied a fair trial by the conduct of the Assistant United States Attorney, in asking a clearly prejudicial question?

3. Whether the petitioner was denied a fair trial by the conduct of the Assistant United States Attorney in displaying alleged counterfeit $20.00 Federal Reserve Notes to the jury, which were neither offered nor submitted into evidence?

4. Whether the petitioner was denied a fair trial by the admission into evidence, over objection, hearsay declarations of alleged co-conspirators without proof *aliunde* that petitioner was connected with the conspiracy at the time the declarations were made?

5. Whether the evidence totally failed to establish the conspiracy alleged, but rather established numerous and distinct conspiracies fatally and prejudicially at variance with the indictment?

Statutes Involved

The statutory provisions involved are 18 U. S. C., Sections 371, 472, 473. They are printed in Appendix A, *infra*.

Statement

A five count indictment was returned by the Federal Grand Jury for the Eastern District of Pennsylvania on November 21, 1961, in which eight defendants, including the petitioner, were charged with violating certain provisions of Title 18 of the United States Code (18 U. S. C., sec. 371, 472, 473). The first count of the indictment charged appellant and seven others with a conspiracy to pass, utter, publish, possess, conceal, sell, transfer, receive and deliver forged and counterfeited $20.00 Federal Reserve Notes in Bucks County and Philadelphia County, Pennsylvania, between March 27 and July 27, 1961. Thirteen overt acts were charged; petitioner was not alleged to have committed any overt act. The remaining counts of the indictment charged substantive offenses against other defendants, but not against petitioner.

During the course of the trial, upon commencement of petitioner's cross examination of Albert Wood, the chief witness for the government, petitioner called upon the government to produce the transcript of the testimony of this witness before the Grand Jury. The request was denied (18a).* Petitioner then requested that he be permitted to inspect the transcript for any inconsistencies with the witness's direct testimony. The request was denied (19a). Petitioner then requested the trial court to inspect the transcript for inconsistencies. This request was also denied (19a).

Immediately following the completion of cross examination of the informer, Albert Wood, the Assistant United States Attorney commenced redirect examination by inquiring into the absence of any written notes or statements made by Wood. He had stated on cross examination that his entire testimony was from memory. Wood testified that he made telephone reports to the Secret Service while other defendants, namely, Ellis and Gold, were in his hotel room in Philadelphia. The following colloquy thereupon took place (23a):

> "Q. Did you make notes while they were coming in and out? A. No. It would be impossible.
>
> Q. When you made notes during the course of your investigation, did you ever leave them on your person? A. Well, I would hold them on my person until I could relay the message, and then they would be destroyed immediately—
>
> Q. Why would you do that? A. —as soon as possible. Because it was unsafe. You never knew when you were going to be shook down and checked out.
>
> Q. You were shook down and checked up several times in this case, weren't you? A. Yes; I was.

---

*"a" refers to the record abstract printed as appellant's appendix in the United States Court of Appeals for the Third Circuit, which appendix has been certified and filed with this petition as a part of the official record below.

Q. Did they ever find any notes on you? A. Nothing.

Q. Have you any idea what would have happened to you if they found those notes?

Mr. Bloom: Objection.

Mr. Di Giacomo: Objection, your Honor.

Mr. Papola: Objection.

Mr. McAllister: Objection.

The Court: Sustained."

This final question was clearly prejudicial, even though it went unanswered. Furthermore, the Court itself, even though sustaining defense counsels' objection, reemphasized the question, as is demonstrated by the colloquy which followed immediately thereafter.

"Mr. Di Giacomo: I move for the withdrawal of a juror, your Honor. I think that was extremely prejudicial.

The Court: Motion denied.

I think that it is inherent in what the witness has been saying time and time again that he didn't want to carry any notes. *It is pretty obvious why he didn't.*" (23a) (Emphasis added.)

The tangible, physical subject matter of the trial was counterfeit $20.00 Federal Reserve Notes. During the course of the trial, the Assistant United States Attorney and one of the Secret Service Agents, in full view of the jury, thumbed through and handled, at the counsel table, a stack of $20.00 Federal Reserve Notes, which apparently were counterfeits. Petitioner objected to this display before the jury of the notes, inasmuch as they were not in evidence and had not been connected to petitioner or this case (24a). The government committed itself to introduce the notes into evidence (24a to 25a). They were never even

offered as evidence, and thereafter the court instructed the jury to disregard their presence in the courtroom (25a).

The only direct testimonial evidence in the entire trial with regard to the petitioner's participation in the conspiracy charged came from the witness Albert Wood. This witness first met petitioner on July 5, 1961 (16a to 17a). Numerous hearsay declarations of alleged co-conspirators concerning petitioner and made prior to July 5, 1961 were admitted into evidence over petitioner's objections. (The court's attention is called to the fact that in the indictment petitioner was captioned as "Herman Myron Feldman, a/k/a Muzzy").

The government's proof at trial in the instant case demonstrated a number of separate and distinct conspiracies. Certain of the conspiracies revolved around the defendant, Boyance. In others, this position was occupied by the defendant, Ellis.

Boyance commenced passing counterfeit $20.00 Federal Reserve Notes on April 3, 1961 (8a to 9a). Together with defendant, Keifaber, they persuaded defendant, Roberts, to pass large quantities of the notes (8a to 10a).

Defendants, Bescoe, Markley, Boyance and Keifaber, confederated in an abortive scheme and attempted to sell counterfeit notes to Agent Motto of the Secret Service (10a to 12a).

Neither of the two foregoing ventures was in any manner whatsoever connected to the petitioner. There was no proof that petitioner ever knew, met or dealt with Boyance, Bescoe, Keifaber, Markley or Roberts.

On June 20, 1961 Boyance, Bescoe, Keifaber and the undercover agent, Wood, traveled to Newark, New Jersey, in an attempt to purchase counterfeit notes. The transaction never materialized (12a).

Upon returning to Philadelphia, defendant, Ellis, appeared upon the scene. At this juncture, Wood dropped Boyance and Bescoe, and confederated with Ellis. Wood admitted that he had dealt with three separate groups (15a, 20a, 21a). Wood further admitted that his dealings with Ellis and defendant, Gold, was a "separate deal" and that the petitioner was in no way connected therewith (21a). Wood was constrained to admit that he did not know what dealings, if any, petitioner had with defendants, Boyance, Bescoe, Ellis, Gold and Keifaber, and whether or not these defendants constituted one continuous group (23a, 24a).

The record is barren of proof of any connection between petitioner and Boyance, Keifaber and Roberts. The record is barren of proof of any connection between petitioner and Boyance, Bescoe, Keifaber and Markley. The record is barren of proof of any connection between petitioner and Gold.

Although the witness and undercover agent, Wood, attempted to induce petitioner to deal in counterfeit $20.00 Federal Reserve Notes, no dealings ever materialized or transpired (17a, 22a).

Reasons for Granting the Writ

1. This court should settle the law on the issue as to whether a trial court *must* examine the transcript of testimony before a Grand Jury of a witness who has testified there and then on direct examination for the government in a federal criminal trial, once a timely request has been made by a defendant for such an inspection, in order to ascertain if any inconsistencies exist between the testimony in the Grand Jury and at trial. It is an issue vital to the effective administration of criminal justice in the federal courts, and one of frequent recurrence. The question has not been passed upon by this court, and was expressly left

unanswered in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395, 401 (1959), inasmuch as no such request had been made upon the trial court in that case. *The request was made in this case;* the issue is clearly presented to the court now. Indeed, in the *Pittsburgh* case, Mr. Justice CLARK stated the following *dictum*:

> "Petitioners also claim error because the trial judge failed to examine the transcript himself for any inconsistencies. But we need not consider the problem because petitioners made no such request of the trial judge. The Court of Appeals apparently was of the view that even if the trial judge had been requested to examine the transcript he would not have been absolutely required to do so. It is contended here that the Court of Appeals for the Second Circuit has reached a contrary conclusion. United States v. Spangelet (N. Y.) 258 F. 2d 338. *Be that as it may, resolution of that question must await a case where the issue is presented by the record.*" (Emphasis added).

There is a genuine conflict among the various circuits as to whether the trial court must make the requested examination. The court below held that there must be a *prima facie* showing of a "particularized need" for the court is duty bound to make the inspection. The Third Circuit thus aligned itself with the decisions of the Court of Appeals for the District of Columbia and the Fourth, Eighth and Tenth Circuits. See *Gordon* v. *United States*, 299 F. 2d 117 (D. C. Cir. 1962); *Pittsburgh Plate Glass Co.* v. *United States*, 260 F. 2d 397 (4th Cir. 1958), *aff'd* 360 U. S. 359 (1959); *Hance* v. *United States*, 299 F. 2d 389 (8th Cir. 1962); *Barry* v. *United States*, 292 F. 2d 53 (10th Cir. 1901).

On the other hand, the Second Circuit does not require the showing of a "particularized need" prior to the trial

court's examination of a witness's Grand Jury testimony in search for inconsistencies between it and the testimony given by the witness at trial. The only required showing in the Second Circuit is that the witness has in fact testified in the Grand Jury. Upon timely request, the trial court must make the inspection. *United States* v. *Giampa*, 290 F. 2d 83 (2d Cir. 1961); *United States* v. *Hernandez*, 282 F. 2d 71 (2d Cir. 1960), *reh. den.*, 290 F. 2d 86 (2d Cir. 1961); *United States* v. *Zborowski*, 271 F. 2d 661 (2d Cir. 1959).

The procedure followed in the Second Circuit was outlined by the Court of Appeals in the *Giampa* case *supra*, as follows:

> "* * * If the Government calls a witness who has given testimony before a Grand Jury it is under a duty to have the transcript of such testimony available upon the trial. If it is from then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the trial and before the grand jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel * * *
>
> In the past, claims have been made that inconsistencies must first be established * * * before a court examination of the minutes may be called for. *This approach is quite unrealistic and would defeat the very purpose of the inspection. How can court or counsel know whether there is inconsistency or not unless the minutes are first read.* (Emphasis added). 290 F. 2d at 83."

The procedure was also enunciated by the Court of Appeals in the *Zborowski* case, *supra*, as follows:

> "Even if there were no showing of possible inconsistency in the testimony of a witness in a perjury case, *or indeed in any case, where the testimony of such witness is the only direct evidence against the defendant and no valid reason for secrecy exists, the court should upon request examine the grand jury minutes of such a witness for possible inconsistencies.* * * * The reason for such a rule is obvious. (citations omitted) Surely the defendant should have access to all conflicting testimony given under oath by the one direct witness who gives him the lie. *It offends all sense of fairness to first require a showing of possible inconsistency preliminary to examination of the minutes by the judge.*" 27 F. 2d at 666 (Emphasis added)

The Court below recognized the conflict between the Second and other circuits when it stated:

> "We think that the rule of the Second Circuit as expressed in *United States v. Giampa, supra*, equates the right of the defense to an examination of Grand Jury testimony to the right to the production of a Jencks Act Statement. The only distinction is that the trial judge must first examine the Grand Jury transcript." (Adv. op. pg. 9) (Appendix B, *infra*).

This court should promptly answer this question which was left unanswered in the *Pittsburgh Plate Glass Co.* case, *supra*, and resolve the conflict among the circuits as to whether the trial court must make such inspection upon timely request, and also resolve the conflict as to whether or not a defendant need show anymore than the fact that a witness had previously testified before the Grand Jury.

In the instant case, the witness Wood gave the sole direct evidence against the petitioner. Under these circumstances, it was error for the trial court to refuse to make the requested inspection. Although the court below decided that the trial judge did not abuse his discretion in so refusing, it recognized nonetheless the seriousness of the issue presented when it stated:

> "The fact that the testimony sought to be examined is that of the sole or most important witness in the case against the defendant is deemed significant." (Adv. op. p. 7) (Appendix B, *infra.*)

2. This court is responsible for the judicial supervision of the administration and enforcement of criminal justice in the Federal Courts. *McNabb* v. *United States*, 318 U. S. 332 (1942); *Marshall* v. *United States*, 360 U. S. 310 (1959). The duty of the Government in a criminal case is to see that justice is done, and not simply that it shall win a case. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). The conduct of the Assistant United States Attorney in the instant case, whether by design, stratagem, or simply by mistake, (1) in displaying the counterfeit $20.00 Federal Reserve Notes to the jury, committing the government to their introduction into evidence, and then failing to do so, and (2) in asking an unwarranted and clearly prejudicial question, could only result in an unfair trial for this petitioner. This Court should, in the exercise of its supervisory powers, declare that the aforesaid conduct of the Government's attorney was not in accord with the standards of procedure for a federal criminal trial. This Court should indicate the impropriety of such conduct by reversing the judgment below.

There was never, during the entire trial, one scintilla of evidence to physically connect the petitioner with any coun-

terfeit $20.00 Federal Reserve Notes. Their presence in the court room was improper and the jury should not have been exposed to them. IV Wigmore on Evidence, Sec. 1157 (3d Ed. 1940); *State* v. *Foret*, 196 La. 675, 200 So. 1 (Sup. Ct. La. 1941); *Hauger* v. *United States*, 173 Fed. 54 (4th Cir. 1909); *Gardner* v. *Metropolitan Utilities Dist.*, 278 N. W. 137 (Sup. Ct. Nebraska 1938).

In entering into the subject matter of violence and the witness Wood's speculations as to what would have happened to him had any of the defendants found handwritten notes of the events in his person, (23a) the Assistant United States Attorney once more committed an impropriety which could only result in prejudice to the petitioner, with the resultant denial of a fair trial. *United States* v. *Yettl*, 121 F. 2d 927 (3d Cir. 1941).

3. The court below gravely erred in admitting into evidence, over objections, hearsay declarations of alleged co-conspirators of petitioner, which declarations tended to connect petitioner with the conspiracy. There was no proof "*aliunde*" that petitioner was connected to the conspiracy at the time that the declarations were made. All of the hearsay declarations referred to petitioner as "Muzzy." The record is barren of any proof independent of the declarations that the petitioner was the person referred to as "Muzzy". This Court granted *certiorari* and reversed a conviction wherein a similar situation, coupled with other errors, occurred. *Glasser* v. *United States*, 315 U. S. 60 (1942). *Accord*, *Continental Baking Company* v. *United States*, 281 F. 2d 137 (6th Cir. 1960); *Ferina* v. *United States*, 302 F. 2d 95 (8th Cir. 1962); *Nibbelink* v. *United States*, 66 F. 2d 178 (6th Cir. 1933). *Cf. United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

4. This Court has not hesitated to grant *certiorari* on questions of fact, and reverse convictions where the con-

victions fail to rest upon any evidence. *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Thompson* v. *Louisville*, 362 U. S. 199 (1960). This Court has also granted *certiorari*, and summarily reversed a federal criminal conviction for the *insufficiency of evidence*. *United States* v. *Washington*, 357 U. S. 348 (1958). In the case at hand, there is simply no evidence to substantiate the conclusion that petitioner was a part of the alleged overall conspiracy charged, or that he did anything in furtherance of its objectives. Indeed, the testimony of the government's chief witness conclusively states the opposite. *United States* v. *Cianchetti*, 315 F. 2d 584 (2d Cir. 1963).

Petitioner contends that the evidence and principally the testimony of Albert Wood, clearly established a number of separate and distinct conspiracies, and stresses *Kotteakos* v. *United States*, 328 U. S. 750 (1946). The court below held *Kotteakos* to be inapplicable, because there the government admitted the existence of several conspiracies. (Appendix B, *infra*) (Adv. Op. p. 5). It is submitted that *Kotteakos* is applicable, and that the establishment of several conspiracies by the evidence at the trial below has prejudiced the petitioner. Even tested by the standards set forth in *Blumenthal* v. *United States*, 332 U. S. 539, 559 (1947), the result reached below is plainly erroneous.

CONCLUSION

For the foregoing reasons, this petition for a writ of ceritorari should be granted.

Respectfully submitted,

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Date: April 17, 1964.

[APPENDICES FOLLOW]

APPENDIX A

Statutory Provisions Cited and Quoted

18 U.S.C. sec. 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. sec. 472. Uttering counterfeit obligations or securities

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both.

18 U.S.C. sec. 473. Dealing in counterfeit obligations or securities.

Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000.00 or imprisoned not more than ten years, or both.

APPENDIX B

Copies of Opinions and Judgments Below

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DENYING PETITIONER'S POST TRIAL MOTION FOR JUDGMENT OF ACQUITTAL, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (Reported at 215 F. Supp. 390)

LUONGO, J. March 7, 1963

Rudolph E. Boyance, Lenox B. Markley, William Keifaber, Edward Ellis, Herman Myron Feldman, Edwin Bescoe, Samuel Gold and John David Roberts were charged in count 1 of this indictment with conspiracy to possess, conceal, pass, deliver, sell, transfer, etc., counterfeit $20 Federal Reserve notes in violation of 18 U.S.C.A. §371. Boyance and Keifaber were also charged in counts 2 through 5 of the same indictment with the substantive offenses of possessing and delivering counterfeit $20 notes.

Boyance, Bescoe and Roberts pleaded guilty. The remaining defendants were tried by court and jury. Keifaber, Ellis, Feldman and Gold were found guilty on the charge of conspiracy and Keifaber was also found guilty on the substantive offenses charged in counts 3 and 4. The jury returned a verdict of "not guilty" on the conspiracy charge against Markley and, by a directed verdict, Keifaber was acquitted on the substantive offense charged in count 2.

The four convicted defendants filed post trial motions, all of which have since been withdrawn except Feldman's motions for judgment of acquittal or, in the alternative, for a new trial. Feldman's motions are before me for consideration and will be discussed together. The grounds

asserted by Feldman are generally (1) variations between the indictment and proof; and (2) alleged trial errors.

1. *Variations between indictment and proof:*

Two variations have been alleged, (a) that a single conspiracy was charged and multiple conspiracies were proven, and (b) that Feldman was charged with conspiring within the Eastern District of Pennsylvania and the proof failed to show that he was ever present within this district.

The testimony, viewed in the light most favorable to the government (*United States* v. *Carlucci*, 288 F. 2d 691 (3rd Cir. 1961), cert. den. 366 U. S. 961 (1961); *United States* v. *Amedeo*, 277 F. 2d 375 (3rd Cir. 1960)) reveals the following:

In April 1961, defendants Boyance and Keifaber were in possession of a quantity of counterfeit $20 Federal Reserve notes, one of which was given by Boyance to a Mr. Crudo from whom it was seized by Treasury agents. The occurrence was testified to by Crudo and the note was identified as a counterfeit and put in evidence.

Roberts, one of the defendants, testified that he met Boyance in jail and upon Roberts' release from jail he was picked up by Boyance and Keifaber and recruited by them to pass "bad" $20 notes, which he did.

Carmen Motto, a special agent for the Treasury Department, testified to negotiations wherein he, posing as "Nickey Spina" from New York, dickered with Boyance and Keifaber for the purchase of counterfeit $20 notes from them. The negotiations commenced in April 1961 and continued off and on into May when Boyance informed Motto that he was sending two persons to New York to see him to make a deal.

Appendix B

Bescoe (Boyance's brother-in-law) and Ellis were the persons who went to New York on that mission. Bescoe testified he was to get $18,000 of good money from Motto, there was to be an interval of an hour or so after the receipt of the good money, and Ellis was then to obtain $100,000 of counterfeit money from someone whom Ellis knew, after which Motto would be told where to pick up the counterfeit notes. The deal fell through when Motto refused to deal except on a hand to hand basis and Bescoe and Ellis returned to Philadelphia.

In June 1961 a new prospective customer appeared. He was Al Wood, who was in fact a special employee or informant for the Treasury Department. Wood had met Bescoe in Detroit. He learned from Bescoe that he had access to counterfeit $20 notes through his brother-in-law, Boyance. Bescoe and Wood travelled together from Detroit to meet Boyance at his home and thereafter the three met with Keifaber and negotiations for the purchase of counterfeit $20 notes by Wood were had. An agreement was arrived at and Boyance, Keifaber, Bescoe and Wood drove to the railroad station in Newark, New Jersey where there was to be an exchange of bad money for good. Keifaber and Boyance's source for the counterfeit money, a person referred to as "Muzzy," failed to appear. This name had been mentioned in Bescoe's presence several times as the source of the counterfeit. Both Keifaber and Boyance made telephone calls in an attempt to reach their source. When he left the telephone booth, Keifaber stated that "Muzzy" didn't want to make the deal.

Following that failure, Boyance, in the presence of Bescoe, introduced Wood to Ellis who thereafter informed Wood that in dealing through Boyance and Keifaber he was dealing with the wrong persons, since she (Ellis) was

he contact and the only one who could make the deal for counterfeit money. He explained that the others had gone with him on prior occasions to pick up some samples and that they went back without his knowing it.

From Wood's testimony it appears that there were numerous discussions between him and Ellis about obtaining counterfeit $20 notes. In the beginning of July, 1961, he went to New York with Ellis where they met one Oberman and as a result of that meeting, Ellis made a telephone call addressing the person to whom he was speaking as "Muzzy." Ellis gave Wood the address, 180 Prospect Street, East Orange, New Jersey, to write down. The two then went to that address to an apartment where the name on the bell was "H. Myron Feldman." When they entered the apartment Ellis greeted Feldman by the name "Muzzy" to which Feldman responded, referring to Ellis as "Eddie." Feldman indicated that he knew they were there for the "twenties." After taking certain precautions as to Wood's identity, Feldman announced the terms on which he would deal, stating that he had gotten rid of enough of the counterfeit money and was not "hurting," that he had a substantial quantity that was buried, and that he would not take chances. The terms dictated by Feldman were that Wood was to bring good money to Feldman and several hours later he would be told where he could pick up the counterfeit. As evidence of his good faith, Feldman offered to give Wood a note against his bank account. Although a deal was arranged, it was not consummated, apparently because of suspicions Feldman had about Wood. When the efforts to obtain counterfeit money from Feldman proved unsuccessful, Ellis then led Wood to Gold who made attempts to secure counterfeit money from another source, but his efforts proved unsuccessful.

Appendix B

In addition to the testimony of the several witnesses referred to, telephone company records were produced indicating that calls were made from the hotel room in New York where Ellis and Wood had stayed to a telephone in East Orange listed in the name of M. Feldman; calls from that hotel room to Ellis' home in New Jersey; a call from Wood's room at the Essex Hotel in Philadelphia to the telephone in East Orange listed in the name of M. Feldman; and numerous calls during the period in question from Boyance to Ellis.

Feldman testified as part of his defense. He denied Wood's testimony as it related to Feldman's involvement with dealings in counterfeit money. Significantly he admitted having had business dealings with Ellis and that Ellis had brought Wood to his, Feldman's, apartment. He testified that Wood offered to buy counterfeit money from him but that he had flatly refused, disclaiming any knowledge of counterfeit money. Feldman admitted, in the course of his testimony, that a warehouse which he used in his business was located within a mile or so of the Newark railroad station.

(a) *Multiple Conspiracies*:

Feldman contends that the evidence sustains no proof of a single conspiracy, that if the government proved anything it proved multiple conspiracies, a fatal variance between pleading and proof under the holding of *Kotteakos* v. *United States*, 328 U. S. 750 (1946). Such a contention is not unusual in complex conspiracy cases and the frequency with which it is asserted led the court, in *Lefco* v. *United States*, 74 F. 2d 66 (3rd Cir. 1934) to comment at page 68:

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"There is nothing new in this defense of multiple conspiracies and nothing uncertain in the law arising from such a defense. Of course, to sustain a verdict on an indictment charging one particular conspiracy the evidence must establish the conspiracy charged. Evidence that establishes another conspiracy or several other conspiracies will not sustain the verdict. From this statement of law defendants, when in extremity, commonly resort to the contention that, not knowing all the conspirators or not knowing all the others were doing, they are responsible only for what they themselves were doing when caught, and as that usually is only a part of the conspiracy, they say, the part being less than the whole, it is different from the whole and in consequence is not the conspiracy alleged in the indictment and, for lack of proofs, they should be acquitted."

The plea of multiple conspiracies was recently rejected by the Court of Appeals for the Fourth Circuit in United States v. Wenzel, 311 F. 2d 164, 167 (4th Cir. 1962), a case which likewise involved a counterfeit money distribution ring. The following language from that opinion is peculiarly applicable here:

"The pattern of this conspiracy was plain and uncomplicated. It had for its object the realization of profit by the foisting upon the public of counterfeit money. To accomplish this the counterfeits had to be obtained and they had to be put in circulation. Mucherino furnished the money to Agresti and the latter, along with appellant and other associates, arranged to put it into circulation by Lockett and the younger Wenzel. It is immaterial that Mucherino or Agresti or the appellant may not have known the persons that

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Lockett recruited to help him in uttering the money, or that these persons were not among the group which originally planned the illegal enterprise."

In evaluating the quantity and quality of the evidence certain basic principles are useful as guides in determining whether the proof establishes a complex, yet single conspiracy or multiple conspiracies.

"* * * conspiracies involving . . . elaborate arrangements generally are not born full-grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.

"The law does not demand proof of so much. * * *" *Blumenthal* v. *United States*, 332 U. S. 539, 556, 557 (1947); reh. den. 332 U. S. 856 (1948).

"Common design is the essence of conspiracy. The crime may be committed whether or not the parties comprehend its entire scope, whether they act separately or together, by the same or different means, known or unknown to some of them, but ever leading to the same unlawful result. * * * All conspirators need not be acquainted with one another, nor need they have originally conceived or participated in the conception of the conspiracy. Those who come on later and cooperate in the common effort to obtain the unlawful results become parties thereto and assume responsibility for all done before. * * * Nor does the mere fact that conspirators individually or in groups perform different tasks to a common end split up a conspiracy into several different conspiracies. * * *"

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Lefco v. *United States*, *supra* at 68-69; *United States* v. *Lester*, 282 F. 2d 750 (3rd Cir. 1960), cert. den. 364 U. S. 937 (1961); also see *United States* v. *Lipsky*, 309 F. 2d 521 (3rd Cir. 1962).

The summary of the evidence hereinabove set forth does not disclose the formation of a conspiracy by proof of a specific meeting at which express agreements were entered into, but such is not required. *Hernandez* v. *United States*, 300 F. 2d 114 (9th Cir. 1962). The evidence does support an almost undeniable inference, certainly one which the jury was justified in drawing, that the defendants joined together at various stages in a common effort to market counterfeit $20 Federal Reserve notes. Their roles appear to be the following: Feldman had large amounts of counterfeit $20 notes under his control and was the source and supplier, in wholesale quantities of the counterfeit money. Boyance, Keifaber and Bescoe sought prospective customers for the counterfeit notes and also recruited persons for passing the notes. Ellis was the liaison between Feldman and Boyance, Keifaber and Bescoe. Roberts was one of the persons recruited to pass the notes. Gold was used as a lead to an alternative source for the counterfeit money.

Whether or not the proof in a particular case establishes a single conspiracy charged in an indictment or establishes several conspiracies which have not been charged is a question of fact for the jury. *Lefco* v. *United States*, *supra*, at page 69. The issue here was submitted to the jury with instructions that the essence of a conspiracy "is a common design and purpose applicable to all members" and if the jury found that any of the defendants were not members of the single conspiracy here charged but were members of a separate conspiracy not

charged, those defendants should be acquitted. No exceptions were taken to the charge although full opportunity was given to take exceptions or to request additional instructions. By its verdict, the jury found that all the defendants, including Feldman, were participants in the single conspiracy charged in the indictment. There is ample support in the record for the jury's finding.

(b) *Conspiring "within" the district:*

The other alleged variation is that the indictment charged Feldman with conspiring "within the Eastern District of Pennsylvania" and the proof fails to disclose that he was ever present or committed any acts within this district. He does not challenge the jurisdiction of this court, for he concedes that all members of a conspiracy may be prosecuted where the conspiracy was formed or where any overt act was committed. *Finley v. United States*, 271 F. 2d 777 (5th Cir. 1959), cert. den. 362 U. S. 979 (1960). His point is that he was charged in the indictment with having conspired "within" this district, consequently there was a fatal variation when the proof failed to disclose that he did anything in furtherance of the conspiracy within the district. His position is untenable. An indictment is sufficient if it puts the accused on notice of the charge against him and is sufficiently detailed to protect him against double jeopardy. This indictment, as worded, was sufficient to put Feldman on notice of the charge against him and it is sufficiently detailed in names, dates and overt acts to protect him against a similar charge in the future. Such variance as there was between the indictment and the proof cannot be said to "affect the substantial rights" of the accused". *Berger v. United States*, 295 U. S. 78, 82 (1935).

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2. *Alleged trial errors*:

(*a*) *Admission of declarations of co-conspirators*:

Feldman complains that at several points in the trial, over his objection, testimony was received of declarations by co-conspirators purporting to involve Feldman in the conspiracy before there was any showing that Feldman was a party to the conspiracy. Declarations of one conspirator in furtherance of the objects of the conspiracy are admissible against a co-conspirator who was not present when the declarations were made if there is proof *aliunde* that the latter is connected with the conspiracy. *Glasser* v. *United States*, 315 U. S. 60 at page 74 (1942), reh. den. 315 U. S. 827 (1942). Each time objection was made in the course of the trial the court gave precautionary instructions to the jury to the effect that it was to consider such statements only against those persons who made the statements or those who were present when the statements were made, and they were not to be considered against an absent defendant unless and until the absent defendant was tied into the conspiracy by independent evidence. The admission of such evidence is proper in the trial of multiple defendants so long as proper precautionary instructions are given. *Torrance* v. *Saltzman*, 297 F. 2d 902 (3rd Cir. 1962). Those instructions were repeated in the court's charge in the following language:

> "Whether or not any particular defendant was a member of, or participated in the common plan, must be established beyond a reasonable doubt by evidence as to that defendant's own conduct, what he himself said or did." (N.T. 767)

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"If and when it appears beyond a reasonable doubt from the evidence that a common plan did exist, and that a defendant was one of the members; then the acts knowingly done and the statements knowingly made by any other person, likewise found to be a member, may be considered by you as evidence in the case as to each defendant found to be a member, even though the acts done and the statements made occurred in the absence and without the knowledge of the absent defendant, provided that the acts done or the statements made were during the existence of the common plan and in furtherance of the purposes and objectives of the plan.

"To summarize, you may not use the statements made by any of the alleged conspirators against a particular defendant to prove that the particular defendant was a member of the plan or conspiracy. That membership must be proved by the acts or statements of the defendant himself.

"But once membership has been so proved, then you may consider the acts and statements of any other member of the conspiracy against the particular defendant so found to be a member, so long as the acts and statements were during the continuance of the plan and conspiracy and in furtherance of it." (N.T. 768-9)

The precautionary instructions at the time the testimony was received and the instructions given in the charge to the jury were proper and were adequate to protect Feldman's rights.

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(*b*) *Reference to photograph of defendant*:

During the testimony of Treasury Agent Sweeney, who was called to corroborate the testimony of Wood, he stated that "a photograph of the individual we knew as Muzzy was exhibited to Wood." Sweeney was then asked and he answered another question unrelated to the photograph. As the assistant United States attorney was posing the next succeeding question, Feldman's counsel objected and asked that reference to the photograph be stricken. The belated motion was granted. Feldman now claims that reference to the photograph was prejudicial error. He misconceives his position as coming within the generally objectionable reference to "rogues gallery" photographs. That is not the case here. There was no indication (except in counsel's brief) that the photograph came from the "files" of the Secret Service. The mention of photograph here was so innocuous that defendant's counsel almost missed it and when it did come to his attention he simply asked that the reference be stricken, which it was. The case relied on by defendant, *Lott* v. *United States*, 218 F. 2d 675 (5th Cir. 1955), cert. den. 351 U. S. 953 (1956), reh. den. 352 U. S. 860 (1956), does not help him. In that case there was a reversal on other grounds and the Court of Appeals stated specifically that the reference to a police photograph was not in and of itself ground for reversal.

(*c*) *Prejudicial question*:

Another of the defendant's complaints is that the court erred in refusing to grant his motion to withdraw a juror when the prosecutor asked Wood, on redirect examination, what would have happened if defendants had found written memoranda on his person. The question, which was never answered, followed testimony by Wood that carry-

ing written memoranda was an unsafe practice. Whether it was unsafe because discovery of such memoranda would reveal his identity and destroy his usefulness as an informant, or because it might expose him to violence, or both, was never clarified. Be that as it may, defendant cannot successfully complain about this redirect examination for it was he who opened up the subject. On cross-examination, defendant's counsel questioned Wood sharply and extensively about his failure to have memoranda of the various meetings and transactions. Wood was asked specifically why he destroyed his notes. The questioning implied that Wood had made but failed to keep memoranda so that there would be no writing to contradict his oral testimony. Surely defense counsel was aware that such an attack invited explanatory counter questions. He cannot now be heard to complain because the unuttered answer of one such question *might* have included fear of violence.

(*d*) *Handling of exhibits not introduced:*

In the course of the trial the assistant U. S. attorney, Mr. Prattis, handled $20 notes at counsel table. This was called to the court's attention, at side bar, by defendant's counsel with a request that Mr. Prattis desist. The latter offered to introduce the notes to satisfy counsel's objection although he had not planned to do so. The court instructed the assistant U. S. attorney that he was not to handle the notes unless he intended to introduce them in evidence. Later in the trial, again at side bar, Mr. Prattis explained that the agents who had picked up the notes were not available and that he could not introduce the notes. He identified the notes as those which had been passed by Roberts. There ensued a discussion among counsel for all of the defendants, following which Feldman's

counsel commented to the effect that it was all right "as long as the District Attorney doesn't use them and Your Honor instructs them." The court proceeded to do precisely what Feldman's counsel requested and instructed the jury to disregard the notes. There was no request for the withdrawal of a juror. There was nothing prejudicial in the incident.

(e) *Refusal to examine Grand Jury testimony:*

Feldman contends that it was error for the court to refuse his counsel's request to peruse Wood's Grand Jury testimony. This is a matter committed to the discretion of the trial judge where a "particularized need" has been shown. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959), reh. den. 361 U. S. 855 (1959). In this case no "particularized need" was shown. It was apparent that counsel sought only, as he himself put it, the opportunity to see if there might be inconsistencies in Wood's testimony. This is not the particularized need to which the Supreme Court referred. The case of *Gordon* v. *United States*, 299 F. 2d 117 (D. C. Cir. 1962) relied on by defendant is inapposite. There the defendant was convicted on the *uncorroborated* testimony of a single witness whose testimony was flatly contradicted by a witness for the defense. Here Wood's testimony was not uncorroborated. Numerous witnesses appeared, including several co-conspirators, special agents, custodians of telephone records, all corroborating Wood's testimony. Feldman called no witness to contradict Wood, the only contradiction coming from Feldman's own lips in the recitation of an explanation which the jury was not compelled to, and obviously did not accept.

Defendant's motions are denied.

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Order

And Now, this seventh day of March, 1963, motions of defendant Herman Myron Feldman for judgment of acquittal and for a new trial are denied.

It is Ordered that the said defendant appear before the court on Friday, April 5, 1963 for imposition of sentence.

(s) Alfred L. Luongo
J.

Opinion of the United States Court of Appeals for the Third Circuit

(Filed—March 26, 1964)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,442

UNITED STATES OF AMERICA,

v.

RUDOLPH E. BOYANCE, LENOX B. MARKLEY, WILLIAM KEFABER, also known as WILLIAM KEFABER, also known as RUSSELL WILLIAM TUCKETT, EDWARD ELLIS, HERMAN MYRON FELDMAN, also known as "MUZZY," EDWIN [illegible]COE, SAMUEL GOLD, JOHN DAVID ROBERTS

HERMAN MYRON FELDMAN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued November 6, 1963

Before STALEY, HASTIE and SMITH, Circuit Judges.

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Opinion of the Court

By Staley, *Circuit Judge.*

The appellant Herman Myron Feldman was tried and convicted on an indictment charging him and seven other persons with conspiring to utter or deal in counterfeit obligations, 18 U. S. C., §371.[1] The obligations specified as the subject of the conspiracy were forged and counterfeited $20 Federal Reserve notes. Though other defendants were also charged with the substantive offenses of uttering or dealing, we are concerned on this appeal only with the count charging Feldman as a conspirator.

Prior to trial three of the defendants pleaded guilty to this charge, and some of them testified against the five remaining defendants. The jury returned a verdict of guilty against four of those tried, including Feldman.[2] Only he has appealed from the judgment of conviction.

The evidence adduced at trial tended to establish that several of the defendants had engaged in the conspiracy as charged. The sufficiency of that evidence to prove the guilt of the defendants to whom it related is not challenged in this court.[3] However, the appellant vigorously

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[1] Numerous acts, any of which constitute the substantive offenses of uttering or dealing are set forth in 18 U.S.C. §§ 472, 473 and in the indictment.

[2] The district court denied Feldman's motions for a judgment of acquittal or a new trial. *United States v. Boyance*, 215 F. Supp. 390 (E.D. Pa. 1963).

[3] Indeed, in his brief appellant relates that counterfeit notes were passed in Bristol, Horsham, and Lansdale, Pennsylvania, and that such notes had been transferred in Chalfonte, Pennsylvania.

challenges the adequacy of the proof to establish his connection with the conspiracy. We turn then to a consideration of that evidence.

The theory of the Government was that Feldman was the source of the counterfeit notes which were uttered by the other parties to the conspiracy. The only direct testimony in the case against him was given by Albert Wood, who stated that he was an undercover agent or paid informer employed by the United States Secret Service. Wood was brought to Philadelphia from Detroit by one of the defendants in June of 1961 after he had made known his desire to obtain counterfeit $20 notes. A meeting was arranged by several of the defendants for completing a purchase of the notes in Newark, New Jersey, but these efforts proved abortive when the person who was to supply them failed to appear at the designated meeting place. Several additional efforts to negotiate a sale met with a similar result.

Subsequently, Wood was introduced to the defendant Ellis by one of the conspirators. Ellis stated that he was the only person who could arrange a sale of the counterfeit $20 notes. On July 5, 1961, he accompanied Wood on a trip to New York and placed phone calls from a hotel there to a telephone number in East Orange, New Jersey. That number was later identified through telephone company records as being listed under Feldman's name. During the course of one of those conversations, Ellis directed Wood to write down the address "180 Prospect Street, East Orange, New Jersey." The two men then drove to that address and entered an apartment which had the name "H. Myron Feldman" on the doorbell. Wood testified that Ellis greeted the person who answered the door as

"Mootsie."[4] According to Wood, Feldman stated that he knew they were there for the "twenties," and during the ensuing conversation declared that he had "disbursed over a half million dollars' worth of these twenties." However, when Feldman said that he would "deal" only if Wood first deposited an amount of cash with him, Wood indicated that it would be necessary for him to obtain the approval of his principal in Detroit. Wood and Ellis then returned to their hotel in New York, where Wood made a telephone call purporting to obtain approval of the transaction. Ellis then phoned Feldman and completed arrangements for the purchase. However, when Wood met Ellis the following day to make the requested deposit of cash, the latter informed him that there would be no deal.

Feldman contends that the evidence established several unrelated conspiracies among various groups of the defendants, rather than the single conspiracy charged in the first count of the indictment. In a similar vein, he asserts that there was no proof of any activity on his part in furtherance of the conspiracy charged, since the transaction alleged to have been discussed in his apartment was never consummated.

Of course, in considering the sufficiency of the proof to establish Feldman's connection with the conspiracy, we must view the evidence, including the testimony of Wood, together with all inferences reasonably and logically deducible therefrom, in the light most favorable to the Government since the jury has returned a verdict of guilty.

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[4] Though this name also appears in the trial transcript at several points as "Muzzy," it is not contended that the variance is significant.

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United States v. Minker, 312 F. 2d 632 (C. A. 3, 1962), cert. denied, 372 U. S. 953 (1963); United States v. Carlucci, 288 F. 2d 691 (C. A. 3), cert. denied, 366 U. S. 961 (1961); United States v. Giuliano, 263 F. 2d 582 (C. A. 3, 1959). The record discloses that several of the defendants attempted to obtain counterfeit $20 notes from a source in New Jersey on several occasions.[5] Moreover, the evidence shows that one of these defendants, whose role in the conspiracy is not challenged in this court, introduced Wood to Ellis following the unsuccessful attempt to execute a purchase in Newark, New Jersey. Ellis boasted that he was the only person who could arrange a sale, and his relationship with Feldman was established by direct testimony. The Government introduced the records of telephone calls not only between Ellis and Feldman, but between Ellis and another of the defendants during the period when the former was attempting to arrange a sale of the notes to Wood. We need not here again recite the testimony of the discussion of the "twenties" in Feldman's apartment, but need only state that this testimony, coupled with the circumstances we have related, provided a sufficient evidentiary basis for the jury to find that this incident was a part of the larger criminal enterprise charged in the indictment, rather than a separate, isolated occurrence. We might note here that

[5] In addition to the efforts in which Wood was involved, Carmen Motto, another Government undercover agent, testified to an unsuccessful attempt by Ellis to arrange a sale to him in New York City.

the district court in its charge left this question to the jury under lucid and specific instructions.[6]

In this setting, Feldman's reliance on Kotteakos v. United States, 328 U. S. 750 (1946), in support of his multiple conspiracy argument is misplaced. As the first sentence of the opinion of the Court in that case indicates, the Government there admitted that the evidence established several conspiracies rather than the single general conspiracy charged in the indictment. The question, answered by the Court in the affirmative, was whether this resulted in substantial prejudice to the petitioners. The matter sub judice is more analogous to Blumenthal v. United States, 332 U. S. 539 (1947), which deals with the sufficiency of the

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[6] On this point the district court charged:

"If you find from the evidence that has been submitted to you that there was a conspiracy, a common plan and undertaking, the purpose of which was to defraud the United States by intending to pass, utter and publish counterfeit $20 Federal Reserve notes and by intending to deal in counterfeit $20 bills by buying, selling, exchanging, transferring or delivering such counterfeit bills, with the intent that they be passed and used as true and genuine, then any of the defendants as to whom you are satisfied beyond a reasonable doubt took part in that scheme and conspiracy you may convict as members of that conspiracy.

"If, of course, you are not satisfied beyond a reasonable doubt that there was a conspiracy at all, then all of the defendants are entitled to be acquitted on Count 1.

"If you find that one or more of the defendants committed certain acts, but were not members of the conspiracy charged, but were, in fact, members of a separate conspiracy not charged, then you should return a verdict of not guilty as to that defendant or those defendants whom you find not to be members of the conspiracy which has been charged in the indictment".

evidence to establish a single conspiracy. See also, United States v. Lester, 282 F. 2d 750 (C. A. 3, 1960), cert. denied, 364 U. S. 937 (1961).

Our conclusion on this score also effectively disposes of the contention that there was no proof of any conspiratorial activity by Feldman because he withdrew from the proposed sale to Wood. Since the proof was sufficient to implicate him in the more general conspiracy with which he was charged, the undisputed overt acts of his co-conspirators are attributable to him. Pinkerton v. United States, 328 U. S. 640 (1946); Hernandez v. United States, 300 F. 2d 114, 122 (C. A. 9, 1962); United States v. Lester, supra. The same considerations apply to the argument that the district court lacked jurisdiction over Feldman because his criminal activity was confined to East Orange, New Jersey, for it is not contested that several overt acts of the other conspirators occurred within the Eastern District of Pennsylvania.

During the course of the trial several of the witnesses testified over the objection of the defense to statements heard by them which implicated "Mootsie" in the conspiracy. Neither the Government nor the district court denied the hearsay character of these statements. However, this testimony was admitted into evidence with the cautionary instructions, repeated frequently by the district court throughout the trial, that it was to be considered only against the party who made the statement or in whose presence it was made unless and until independent evidence was adduced implicating Feldman in the conspiracy. The appellant concedes that the admission of this evidence was prejudicial only if there was no evidence *aliunde* of his participation in the criminal enterprise. Since we have already concluded that such evidence was adduced, this

argument must fail. Indeed, once Feldman was linked to the conspiracy by independent evidence, these statements which, of course, were in furtherance of the conspiracy and were made before its termination were admissible as competent and substantial evidence against him. Lutwak v. United States, 344 U. S. 604, 617 (1953). See also, Delli Paoli v. United States, 352 U. S. 232 (1957).[7]

During the cross examination of Wood, defense counsel was permitted to examine and make use of a statement which that witness had given orally to the Secret Service. No significant inconsistencies were developed between that statement and Wood's testimony at the trial. Counsel then asked that he be permitted to examine Wood's testimony before the Grand Jury in order to determine whether there were any inconsistencies with that given at trial. When this was denied, the court was requested to make such an examination. This request was likewise denied. Feldman contends that this refusal by the district court constitutes reversible error.

The law on the right of the defense in a criminal proceeding to examine Grand Jury testimony or to have the trial judge do so is somewhat unclear. In its most recent decision on this question, the Supreme Court has held that the defense has the burden of showing a "particularized need" for Grand Jury testimony. Pittsburgh Plate Glass Co. v. United States, 360 U. S. 395 (1959). However, the Court held that a preliminary showing of contradiction would not be necessary. The question of whether the trial judge is required to examine the transcript for inconsistencies upon

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[7] Professor Wigmore points out that this is not an exception to the hearsay rule, but is a part of the substantive law of conspiracy. 4 Wigmore, Evidence, § 1079; 6 *id.* § 1769 (3d ed., 1940).

request was expressly left open since no such request had been made in that case. 360 U. S. at 401.

The Court of Appeals for the District of Columbia, and the Fourth, Eighth, and Tenth Circuits appear to require a showing of particularized need before the transcript must be examined, although the circumstances which have been found to establish such an exigency are varied. Gordon v. United States, 299 F. 2d 117 (C. A. D. C., 1962); Jackson v. United States, 297 F. 2d 195 (C. A. D. C., 1961); Debinder v. United States, 292 F. 2d 737 (C. A. D. C., 1961); Hance v. United States, 299 F. 2d 389, 398 (C. A. 8, 1962); Bary v. United States, 292 F. 2d 53 (C. A. 10, 1961); Pittsburgh Plate Glass Co. v. United States, 260 F. 2d 397 (C. A. 4, 1958); aff'd, 360 U. S. 395 (1959). See also Beatrice Foods v. United States, 312 F. 2d 29, 38 (C. A. 8), cert. denied, 373 U. S. 904 (1963). The fact that the testimony sought to be examined is that of the sole or most important witness in the case against the defendant is deemed significant. Gordon v. United States, supra.

On the other hand, the Second Circuit appears to require no showing of a particularized need, unless the mere fact that the witness has testified before the Grand Jury can be held to establish this. The essence of the rule in that Circuit is contained in the following excerpt from United States v. Giampa, 290 F. 2d 83, 85 (C. A. 2, 1961):

> . . . . If the Government calls a witness who has given testimony before a Grand Jury, it is under a duty to have the transcript of such testimony available upon the trial. If it is then established at the trial that the witness has testified before the Grand Jury and defense counsel requests that the trial court examine the minutes for inconsistencies in testimony given upon the

trial and before the Grand Jury, the trial court should read the minutes and if inconsistencies be found should make such portions of the minutes available to defense counsel. * * *"

But see the following Second Circuit cases in which the right to an examination appears to have been premised on the fact that the Grand Jury testimony was that of the sole direct witness in the case against the defendant: United States v. Hernandez, 282 F. 2d 71 (C. A. 2, 1960), reh. denied, 290 F. 2d 86 (C. A. 2, 1961); United States v. Zborowski, 271 F. 2d 661, 666 (C. A. 2, 1959). As we have seen, this broad rule has been rejected by the Court of Appeals for the District of Columbia and by the Fourth, Eighth and Tenth Circuits. It should be noted that this court in a per curiam decision based upon Jencks v. United States, 353 U. S. 657 (1957), reversed a conviction because defense counsel was not permitted to personally inspect either a statement which a witness had given to the Government or his testimony before the Grand Jury. United States v. Rosenberg, 245 F. 2d 870 (C. A. 3, 1957). That decision was clearly correct since it involved a statement of a witness. However, because the Supreme Court subsequently ruled that the Jencks rationale is not to be applied to Grand Jury transcripts, Pittsburgh Plate Glass Co. v. United States, supra, that case is not authority for the proposition that defense counsel has an unqualified right to examine such a transcript.

We think that the rule of the Second Circuit as expressed in United States v. Giampa, supra, equates the right of the defense to an examination of Grand Jury testimony to the right to the production of a Jencks Act statement. The only distinction is that the trial judge must first examine the

Grand Jury transcript. But the Supreme Court has expressly held that the rationale of *Jencks* is not to be applied to Grand Jury testimony, and that the defendant has the burden of establishing a particularized need for such testimony. Pittsburgh Plate Glass Co. v. United States, supra. The question then is whether such a need has been shown in the case at bar.

In making the request for an examination by the district court, defense counsel cited nothing to indicate the likelihood of discrepancies in the testimony of Wood. In this court, the sole reason advanced for such an examination is that Wood, who admitted that he was a paid informant of the Government, supplied the only direct evidence in the case against Feldman. While this fact is significant, the record discloses an extensive, searching cross examination of Wood by several counsel for the various defendants. This included the use of his statement to the Secret Service in an attempt to impeach him. This prolonged interrogation failed to impair his credibility. In addition, his version of the critical events was supported by circumstantial evidence. In this setting, the district court, in whose informed discretion Rule 6(e) of the Federal Rules of Criminal Procedure vests the power of inspection, held that:

> "* * * In this case no 'particularized need' was shown. It was apparent that counsel sought only, as he himself put it, the opportunity to see if there might be inconsistencies in Wood's testimony. * * *" 215 F. Supp. at 297.

In view of the opportunity of the district court to observe this witness as well as the entire course of the trial, we

cannot say that he abused his discretion in failing to make the requested inspection.

We have examined the other questions raised by the appellant, but find them to be without merit.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix B

Judgment of the United States Court of Appeals Sought to be Reviewed (Entered on March 26, 1964)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,442

UNITED STATES OF AMERICA,

vs.

RUDOLPH BOYANCE, LENOX B. MARKLEY, WILLIAM KEIFABER, also known as WILLIAM KEFABER, also known as RUSSELL WILLIAM TUCKETT, EDWARD ELLIS, HERMAN MYRON FELDMAN, also known as "MUZZY," EDWIN BESCOE, SAMUEL GOLD, JOHN DAVID ROBERTS,

HERMAN MYRON FELDMAN,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: STALEY, HASTIE and SMITH, *Circuit Judges.*

JUDGMENT

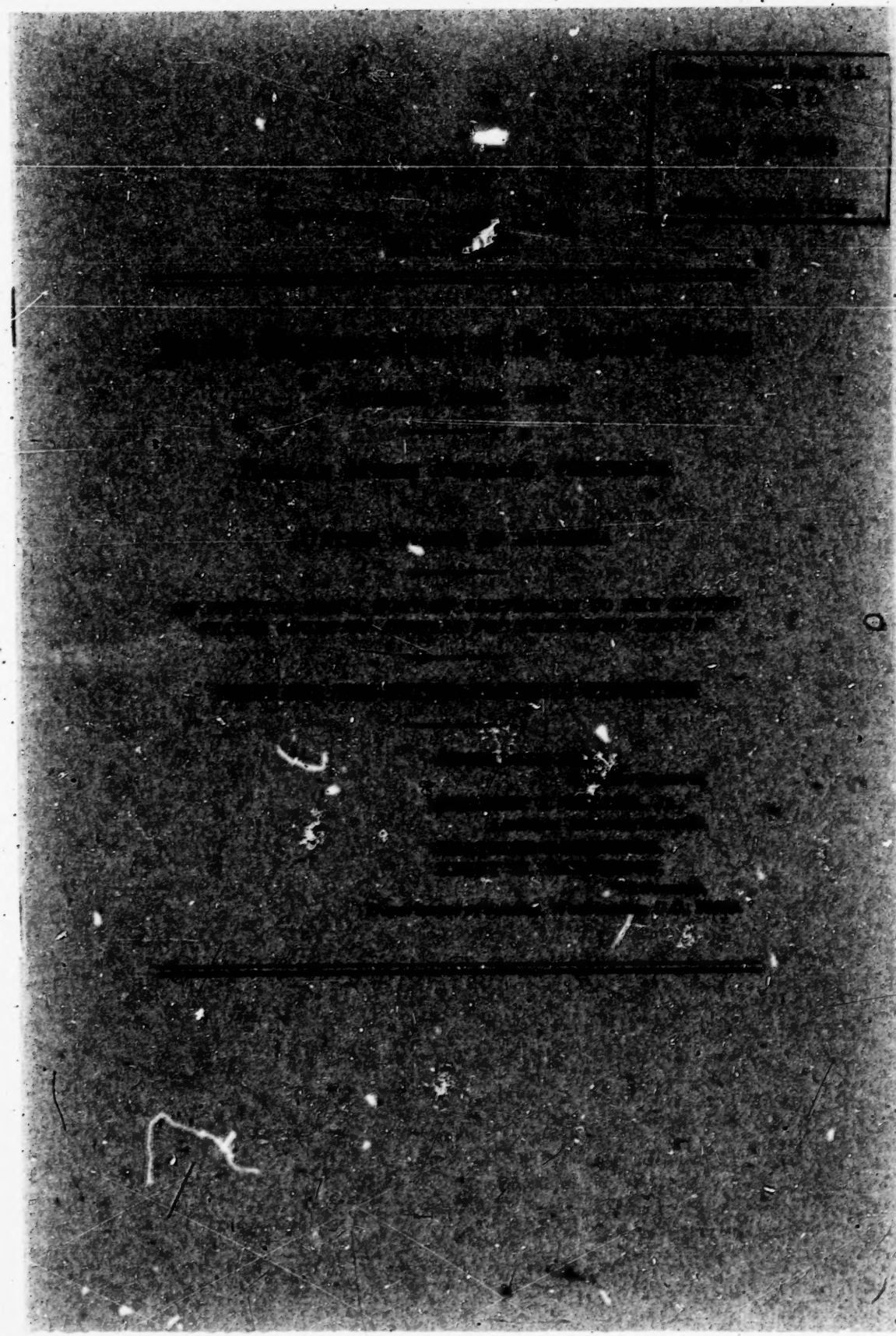
This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of sentence of April 5, 1963, entered April 22, 1963, of the said District Court in this case be, and the same is hereby affirmed.

ATTEST:

IDA D. CRESKOFF,
Clerk

March 26, 1964.



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731-851—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1022

HERMAN MYRON FELDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD DISTRICT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31–42) is reported at 329 F. 2d 372. The opinion of the district court (Pet. App. 16–30) is reported at 215 F. Supp. 390.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1964. The petition for a writ of certiorari was filed on April 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence for the jury to find, as the indictment charged, that a single conspiracy existed to deal in counterfeit currency.

2. Whether the evidence sufficiently established petitioner's participation in the conspiracy.

3. Whether the trial court abused its discretion in declining to examine the grand jury testimony of a government witness for possibly impeaching material.

4. Whether petitioner's conviction should be reversed:

(a) Because of a question to a government witness on redirect examination which the jury was instructed to disregard.

(b) Because there was on the counsel table counterfeit currency which was not introduced in evidence, where the court complied with petitioner's request to instruct the jury to disregard it.

STATEMENT

Petitioner and seven co-defendants were indicted in the United States District Court for the Eastern District of Pennsylvania for conspiracy to deal in and utter counterfeit $20 federal reserve notes and, as to some co-defendants, for substantive offenses, in violation of 18 U.S.C. 371, 472, 473 (R. 2a–5a). Prior to trial, three co-defendants pleaded guilty (Tr. 2–5). The jury acquitted one defendant and convicted the remaining four, including petitioner (Tr. 782–784). Petitioner was sentenced to imprisonment for a period of fifteen months (R. 6a). The district court denied petitioner's motion for a judgment of acquittal or a new trial (*United States* v. *Boyance*, 215 F. Supp. 390 (E.D. Pa.); Pet. App. 16–30), and the court of appeals affirmed the conviction (Pet. App. 31–42).

The evidence may be summarized as follows:

During the month of April 1961, Boyance and Keifaber possessed counterfeit bills (Tr. 17–24, 30–31, 37–51, 84–88). Secret Service Agent Motto, under an assumed name, sought to buy counterfeit currency from Boyance, who gave him a price of $23 for $100 in counterfeit (Tr. 94–96). After various negotiations, Boyance introduced Motto to Keifaber (Tr. 102–104) who said that he had access to $244,000 in counterfeit $20 bills (Tr. 105–107). Negotiations for the purchase of counterfeit currency through defendant Bescoe collapsed because Motto refused to pay for the counterfeit in advance of its delivery (Tr. 110–114, 130–134).

Bescoe, who testified for the government, was later contacted by agent Wood, acting in an undercover capacity. Bescoe introduced Wood to Keifaber, who arranged for all of them to go to Newark, where they were to meet a party referred to as "Muzzy"[1] (Tr. 143). After they had arrived in Newark, Keifaber made a telephone call and then reported that Muzzy would not make a deal, blaming this on Ellis (Tr. 185–188). Thereafter, Wood arranged to meet Ellis, who promised to get him the counterfeit money (Tr. 190–197). Later Wood and Ellis talked with Gold concerning the purchase of bills (Tr. 202–207).

The occasion when Wood finally made contact with petitioner followed a telephone call by Ellis to "Moot-

[1] The nickname of this person is also spelled in the transcript as "Muzzi," "Mootsie," and "Mutsie."

sie" (Tr. 209). They then went to an apartment in East Orange where Ellis rang a doorbell which had next to it the name of "H. Myron Feldman." Petitioner admitted them to the apartment and was greeted by Ellis as "Mootsie" (Tr. 209–211). Petitioner asked Wood whether he was there for the twenties. He then asked how he could know that Wood was to be trusted. After frisking Wood, petitioner discussed the details of the transfer. He said that he had about $85,000 worth left, which he would sell but that he would have to receive payment in advance. Wood said that he would have to contact the man for whom he was acting (Tr. 212–216). Acting the part of the principal, another agent flew in and prepared to go through with the purchase. However, it was not completed, as Ellis reported to them, "'Mootsie' won't deal now. * * * The deal smells" (Tr. 217–223).

There was corroborative evidence in the form of surveillance by other agents (Tr. 423–427, 464–491), hotel records (Tr. 428–437, 445–446), and records of telephone calls (Tr. 441–442, 446–452, 453–463, 495–499).

The Court instructed the jury (Tr. 770–771):

> If you find from the evidence that has been submitted to you that there was a conspiracy, a common plan and undertaking, the purpose of which was to defraud the United States by intending to pass, utter and publish counterfeit $20 Federal Reserve notes and by intending to deal in counterfeit $20 bills by buying, selling, exchanging, transferring or delivering such counterfeit bills, with the intent that they be passed and used as true and genuine, then any of the defendants as to whom you are satisfied

beyond a reasonable doubt took part in that scheme and conspiracy you may convict as members of that conspiracy.

If, of course, you are not satisfied beyond a reasonable doubt that there was a conspiracy at all, then all of the defendants are entitled to be acquitted on Count 1.

If you find that one or more of the defendants committed certain acts, but were not members of the conspiracy charged, but were, in fact, members of a separate conspiracy not charged, then you should return a verdict of not guilty as to that defendant or those defendants whom you find not to be members of the conspiracy which has been charged in the indictment.

Petitioner did not except to the instructions (Tr. 775).

ARGUMENT

1. Petitioner argues (Pet. 13) that a fatal variance existed between the allegation in the indictment of a single conspiracy and the evidence which would support an inference of two conspiracies. Petitioner's argument, more specifically, is that Boyance and Keifaber first endeavored to contact petitioner through Ellis, who later eliminated them in the negotiations by bringing the undercover agent into direct conversation with petitioner. The trial court instructed the jury that it was required, in order to convict, to find that a single conspiracy existed. The government submits that the jury was amply justified in finding that there was a single conspiracy to deal in and utter counterfeit currency.

The evidence shows that petitioner was at the center of activities involving various participants. The defendants were all seeking to dispose of counterfeit bills possessed by him. The fact that Boyance, Keifaber, and Ellis were unsuccessful in arranging a deal with petitioner and that Boyance and Keifaber did not participate in the later negotiations between Ellis and petitioner does not demonstrate that two conspiracies existed. The jury could reasonably find that the existence of petitioner at the center of both negotiations, as well as Ellis' participation in both, showed a common design and object to dispose of the bills and therefore constituted a single overall conspiracy. Cf. *Blumenthal* v. *United States*, 332 U.S. 539, 556–559.

Petitioner states (Pet. 7) that defendant Gold and petitioner were in no way connected and consequently that they were not part of a single conspiracy. Agent Wood testified that the discussions between himself, Ellis, and Gold concerning the purchase of counterfeit bills did not involve petitioner, Boyance, Bescoe, or Keifaber (Tr. 358–359). This testimony, however, appears to mean that petitioner and the others were not mentioned or otherwise directly involved. The jury could nonetheless have reasonably concluded that the overall conspiracy included joint efforts by various members to dispose of bills other than these possessed by petitioner.

In any event, this contention concerns only Gold who did not appeal his conviction. Even if the transactions with Gold constituted a separate conspiracy, petitioner was not prejudiced by the introduction of evidence concerning it when the testimony included

an explicit statement that he was not involved. For, as this Court held in *Berger* v. *United States*, 295 U.S. 78, a conspiracy conviction should not be reversed just because evidence is introduced of a conspiracy involving others.

2. Petitioner contends (Pet. 12–13) that his conviction was invalid because (a) there is insufficient evidence in entirety to show that he was part of the alleged conspiracy and (b) there was insufficient independent evidence of his participation so that the trial court erred in admitting statements against him made by alleged co-conspirators outside his presence. As to the first contention, the Statement above (pp. 3–4) shows ample evidence that petitioner was the very center of the conspiracy to dispose of the counterfeit bills.

As to the second contention, the court carefully cautioned the jury each time the statements of co-conspirators were admitted that they should not be considered as against any defendant not present when the statements were made until his participation was shown by independent evidence (Tr. 139–141, 188, 202–203, 676). This instruction was repeated in the court's charge (Tr. 768). As we have noted, the independent evidence before the jury clearly supported its finding that petitioner was a part of the conspiracy, at least by the time contact was established with him. Contrary to petitioner's suggestion (Pet. 12), there is no rule that the defendant must be shown by independent evidence to be a member of a conspiracy at the time of the declaration when the conspiracy exists at that time, at least where the independent evidence connects

him to it soon thereafter. That petitioner was the party referred to by nickname in the various statements was sufficiently shown by testimony that Ellis addressed him by this name when he and Wood were admitted to the apartment and that petitioner responded to this form of address.

3. This Court has held that defendants are entitled to the production of grand jury testimony only when "'a particularized need' exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400. Here, petitioner made no such showing (see Tr. 234, 246–247). The witness, a government agent, was extensively cross-examined by four defense attorneys, two of whom questioned him specifically as to his prior statement to the Secret Service, without revealing any discrepancies from his testimony at trial (Tr. 235–236, 248–254, 317–218). Moreover, Wood's testimony was corroborated by the testimony of defendant Bescoe and of the surveilling agents, as well as by records showing telephone calls and his meetings with the conspirators at two hotels (see pp. 3–4 above). Although petitioner took the stand and denied offering to sell counterfeit currency to Wood, he admitted the meeting and that the subject was brought up by Wood, but asserted that he had indignantly denied having any counterfeit currency for sale (Tr. 674–676). Defendant Ellis, who was also present, did not testify. There was thus no ground for believing that Wood's grand jury testimony would present anything substantially different from his prior statement to

official sources. Cf. *De Binder* v. *United States*, 292 F. 2d 737 (C.A. D.C.).

In *Pittsburgh Plate Glass Co.*, this Court did not decide whether the trial judge must look at the testimony of a witness before the grand jury in order to decide whether the minutes should be turned over. 360 U.S. at 401. However, it did hold that this Court's holding in *Jencks* v. *United States*, 353 U.S. 657, concerning the production of statements made to the government by government witnesses "had nothing to do with grand jury proceedings." 360 U.S. at 398. It is thus implicit in the *Pittsburgh Plate Glass Co.* decision that where, as on the facts of this case, no particularized need for the grand jury testimony of a witness is shown, the trial judge is not required to examine the testimony merely to determine whether there might be some inconsistency with the witness' testimony at the trial. *E.g.*, *Jackson* v. *United States*, 297 F. 2d 195 (C.A. D.C.); *Parr* v. *United States*, 265 F. 2d 894 (C.A. 5), reversed on other grounds, 363 U.S. 370; *Hance* v. *United States*, 299 F. 2d 389, 398 (C.A. 8); *Bary* v. *United States*, 292 F. 2d 53 (C.A. 10). While *in camera* examinations of grand jury testimony are made upon request as a matter of course in the Second Circuit (*e.g.*, *United States* v. *Giampa*, 290 F. 2d 83, 85), that variation from the practice in the other circuits has not been deemed by this Court a matter requiring review, where on the facts no "particularized need" for inspection was shown. *Berry* v. *United States*, 295 F. 2d 192 (C.A. 8), certiorari denied, 368 U.S. 955; *Brilliant* v. *United States*, 297 F. 2d 385

(C.A. 8), certiorari denied, 369 U.S. 871. There is similarly no occasion for review in this case.

4. (a) During the cross-examination of agent Wood the defendants attempted to imply that he destroyed notes of his conversations in order to avoid cross-examination as to their contents (Tr. 271–272). Upon redirect examination, Wood explained that the reason for their destruction was that it was unsafe to have notes on his person, as he never knew when he might be shaken down. He was then asked as to what the result might have been if notes had been found on his person (Tr. 414). The court sustained petitioner's objection to the question, but denied the motion for a mistrial (Tr. 415).

Petitioner himself opened up this line of questioning by repeated questions about the agent's failure to retain the notes. As the district court said, "[s]urely defense counsel was aware that such an attack invited explanatory counter questions. He cannot now be heard to complain because the unuttered answers of one such question *might* have included fear of violence" (Pet. App. 28). But even if the question put to the witness was objectionable in that it required the witness to indulge in speculation, the objection was promptly sustained.

(b) The record does not support petitioner's charge (Pet. 11) of misconduct by the Assistant United States Attorney "in displaying the counterfeit $20.00 Federal Reserve Notes to the jury, committing the government to their introduction into evidence, and then failing to do so." It appears that there was a

sidebar discussion at which government counsel stated that some of the notes on the counsel table were those passed by defendant Roberts, but that the witnesses to identify the bills were not readily available (Tr. 492–493). Petitioner's counsel did not press the matter further (Tr. 493–494):

> I just asked the question. Well; as long as the District Attorney doesn't use them and Your Honor instructs them.

The court proceeded to instruct the jury that the money which had been handled at the government counsel table was not in the case, that the jury were to disregard it, and that the only evidence which they should consider was that coming from the witness stand (Tr. 494). The court thus complied with petitioner's request and he made no further objection.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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